Blank Page

FILE COPY

No. 56

Office - Supreme Court, U. S.
FILED
MAR 7 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

AMERICAN FEDERATION OF LABOR; JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Petition for Rehearing.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

PRINTED BY CHICAGO LAW PRINTING CO.

Blank Page

INDEX.

PAGE

TABLE OF CASES CITED.

Adkins v. Children's Hospital, 261 U. S. 525 13

American Steel Foundries v. Tri-City Council, 257 U. S. 184 ..... 3, 5

Biggs v. Obermeyer, 292 Ill. App. 79 4

Checkik v. Koletzky, 305 Ill. 518 4

City of Joliet v. Alexander, 194 Ill. 457 4

Coppage v. Kansas, 236 U. S. 1 13

Dorchy v. Kansas, 272 U. S. 306 ..... 2, 5

Erie v. Tompkins, 304 U. S. 64 ..... 2, 5

Leitzman v. Radio Broadcasting Co., 282 Ill. App. 203 12

Lockner v. New York, 198 U. S. 45 ..... 1, 13

Muller v. Oregon, 208 U. S. 412 13

New York v. O'Keefe, 306 U. S. 466 2

Senn v. Tile Layers Union, 301 U. S. 468 ..... 2, 5, 7

Slotzky v. Robe, 189 Ill. App. 537 4

Thornhill v. State of Alabama, 310 U. S. 186 ..... 7, 10

Truax v. Corrigan, 257 U. S. 312 ..... 2, 6, 8, 13

United States v. Carolene Products Co., 304 U. S. 144 ..... 2, 13

Vegelahn v. Guntner, 167 Mass. 92 6

West Coast Hotel Co. v. Parrish, 300 U. S. 379 13

PAGE

STATUTE CITED.

Sec. 188, Chap. 110, Ill. Rev. Stat. (1939) 4

OTHER AUTHORITIES.

Cogley, "Strikes and Lockouts" (1893) p. 193 11

Frankfurter & Greene, "The Labor Injunction," p. 205 ..... 2, 6, 7

Holmes, "Privilege, Malice and Intent," 8 Har. Law Rev. p. 1 6

"Peaceful Picketing and Freedom of Speech," Amer. Bar Journal, Sept., 1940 12

"Picketing by Business Competitors," 87 Univ. of Penn. Law Rev. p. 280 12

Puterbaugh Ch., Pl. and Pra., 7th Ed. p. 404 4

Warm's, "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation," 23 Minn. Law Rev. 255, 274 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Petition for Rehearing.

Now come Ross W. Swing, Irene Boivin, Nan Chapman, *et al.*, respondents, and petition this Court for a rehearing of this case, and respectfully show unto the Court:

I.

The Constitution of the United States is not intended to embody a particular economic theory, whether of paternalism and the organic relation of a citizen to the state or of laissez faire. (See Mr. Justice Holmes, Lockner v. New York, 198 U. S. 45, 75). If the right to regulate local problems thrown up by modern industry and to preserve the peace is axiomatic, then the length and breadth of any economic circle involving local problems is a matter of state police power. The point at which the cost of competition becomes too great is a

matter for determination by wise statesmanship and not by the courts. (See Frankfurter & Greene, "The Labor Injunction," p. 205). Declarations of common law made by this court while persuasive are not binding upon the courts of the states. Whether or not the court of last resort of a state wishes to accept or reject such enunciations of common law is a matter of state policy. To declare that the common law as enunciated by this court is binding upon the states is an unconstitutional invasion of state powers. (Erie v. Tompkins, 304 U. S. 64.) State action is presumed to be constitutional until the contrary appears. While the scope may be narrower where freedom of speech is involved, yet the presumption must prevail unless in the light of the facts, the presumption that the action rests upon some rational basis is overcome. (United States v. Carolene Products Co., 304 U. S. 144.) Public needs when weighed against individual desires raised questions involving contemporary economic and social conditions at a given time. By striking down this decree on its face and disregarding such economic and social conditions, alluded to and discussed in respondents' brief (pages 34 to 56) the opinion of this court overrules its opinion in New York ex rel O'Keefe, 306 U. S. 466, 499, and thereby in effect makes the freedom of speech guarantee a dogma of the absolute, and grants an unbridled license to speak in industrial conflicts between trade unions and industry. This opinion is contrary to the opinions of Mr. Justice Brandeis in Dorchy v. Kansas, 272 U. S. 306; Senn v. Tile Layers Union, 301 U. S. 468. This opinion also defies the fundamental precepts found in the opinions of Mr. Justice Brandeis in Erie v. Tompkins, 304 U. S. 64 and Truax v. Corrigan, 257 U. S. 312, 354.

By the opinion here, this Court has declared that the State of Illinois is limited by constitutional coercion from denying in a circumscribed way the right to the use of the

public streets by trade unions in organizational campaigns to unionize workers in a particular industry. We believe that we rightfully assume from the language appearing in the opinion, "the interdependence of economic interest of all engaged in the same industry has become a commonplace . . ." that this Court was of the opinion that unless the ultimate purpose sought to be attained by trade unions here was lawful, the state would have the right to deny the use of the public streets for the purpose of communicating the facts of the particular labor dispute. Therefore, this Court concluded that based upon this statement which appears in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209, such was the common law to be followed, and that therefore the action of the State in the case at bar was tantamount to drawing a circle of economic competition so small as to amount to a denial of the freedom of speech guarantee of the Fourteenth Amendment. This thesis results in a policy declaration which is far reaching and affects not only the State of Illinois but the economic and social destiny of each and every of the forty-eight States. We believe that we may also assume that this Court considered as an unrebuttable presumption of fact that peaceful picketing by trade unions in front of the employer's place of business was the only effective means or tool in the hands of the trade unions to bring their cause before the public, and in this day and age.

The petitioners here did not complain in the state courts, nor do they seek review here of that part of the order which enjoins and restrains intimidation, threats and violence. (See petition for writ of certiorari, p. 1.) *Nor did they complain in the state courts of the procedure followed in the entry of the final decree by the Appellate Court. As a matter of fact and as stated in the dissenting opinion here, they themselves and in their briefs filed in the Supreme Court of Illinois, in seeking review of the Appellate Court final decree, conceded that the permanent in-*

junctional decree was properly entered, and assigned as error only the constitutional questions which came into play by virtue of that part of the decree which enjoined the so-called "peaceable activities." (See Record p. 39.) *In their petition for writ of certiorari (p. 10) they do not contend that the decree as entered in the Appellate Court of Illinois was a denial to them of a full opportunity to be heard; their sole complaint is that the injunction deprives them of the liberty of freedom of speech.*

Under Illinois practice the decretal part of a chancery decree controls; the preamble plays no part. If the decretal part of the order and preamble are inconsistent, the former prevails. (*City of Joliet* v. *Alexander,* 194 Ill. 457; *Slotzky* v. *Robe,* 189 Ill. App. 537; *Biggs* v. *Obermeyer,* 292 Ill. App. 79; see also Sec. 188, Chap. 110 Ill. Rev. Stats. (1939).) See also *Checkik* v. *Koletzky,* 305 Ill. 518; Puterbaugh Chan. Pl. & Prac., (7th ed.) p. 404. The petitioners in their petition for writ of certiorari and briefs made this concession: they made no attack upon the decree because of the preamble (Petition for writ of certiorari p. 11). Their only attack was upon the decretal part of the order. In the opinion of the Supreme Court of Illinois (Rec. p. 24) the Supreme Court of Illinois did not deny to the trade unions all right of communication; it sustained a decree which denied the right of communication by picketing in front of and adjacent to the employer's place of business, and denied the right to the trade unions by the direct boycott to influence or attempt to influence all persons either from entering the employ of the employer or entering his place of business or trade with him.

By the controlling part of the decree the defendant trade unions and their membership and officials are therefore restrained from conducting the picketing activities and the carrying of banners which designated the plaintiff's business as unfair to organized labor, or designed to induce or influence persons not to enter the place of business on

the sidewalk in front of the employee's place of business; and from seeking by direct boycott to influence persons not to enter the employer's employment or to trade with him. The decree therefore does not in any way deny to the trade unions the right of communication in other well recognized places and by other accepted methods of publicity.

We submit that the Court erred in treating the statement of common law appearing in its opinion in *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, 209, as a basic precept applicable to the record here, is itself guilty of an unconstitutional interference with the right of the States to declare and determine their own policy relative to their own internal affairs. (See *Erie* v. *Tompkins*, 304 U. S. 64.) The State of Illinois, through its court of last resort, and by the opinion of this Court in *Erie* v. *Tompkins, supra*, had the constitutional right to determine for itself what should be its internal policy as to the length and breadth of trade union self-interest in dealing and treating with its own economic problems. Once having declared the policy, such declaration of policy was binding upon this Court. The declaration of policy aforementioned is contrary to the opinions of Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 272 U. S. 306, and *Senn* v. *Tile Layers Union*, 301 U. S. 468. We submit that in both of these opinions this Court declared that the Fourteenth Amendment offers no constitutional blessing to all right to conduct trade union campaigns by the strike in all of the self interest objectives. We respectfully urge that it is a logical inference from the language of the opinion in *Senn* v. *Tile Layers Unions, supra*, that the length and breadth of trade union objectives is a matter of state policy—and state wisdom and that any declared policy offers no denial of the Fourteenth Amendment protection. If the State has the inherent police power to enlarge its policy as to

trade union objectives, then we submit that the State has the equal right to refuse to so enlarge, and that the latter policy is equally a matter of wisdom as the former. The industrial conflict between labor and capital is one which has been recognized as lawful, based upon the doctrine of free competition in the competitive arena. The determination at precisely what point the cost of the competition becomes too great is one which deals with wise statesmanship. It is not the function of the courts to determine this question. (Frankfurter & Greene, "The Labor Injunction," p. 205.)

The historic concept of the competitive right is based upon the recognition that the picketing campaigns and the publicity attendant thereby and the strike itself cause damage and injury. Relief is denied to industry by the doctrine that free competition and the right to compete offers a complete justification and the injury becomes *damnum absque injuria.* (See Holmes "Privilege, Malice and Intent," 8 Har. Law Rev. 1) (*Vegelahn* v. *Guntner,* 167 Mass. 92, 107, dissenting opinion of Mr. Justice Holmes.) The lawful length and breadth of lawful trade union self-interest is an issue which has been the subject matter of serious debate over a period of many years. Even today the question cannot be said to be definitely settled one way or the other. Honest men, judges and courts have and do differ even today. (See opinion of Mr. Justice Brandeis, *Truax* v. *Corrigan,* 257 U. S. 312, 354; Frankfurther & Greene, "The Labor Injunction," p. 47; Warm's "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation, 23 Minn. Law Rev. 255, 274.) Therefore, this issue is one which cannot be said, even today, has been accepted and recognized as settled and determined. We submit therefore that the law in this case must be, viz.: that the trade unions here at the time of the entry of the injunctional order were engaged in a

strike campaign in which the ultimate objective was unlawful; the primary issue and question before this Court is whether or not the State had the right to regulate the use of the public streets so as to deny the right to picket where those engaged therein were so doing in furtherance of an unlawful end; or does the Fourteenth Amendment guarantee of liberty of speech deny to the State the power under practically every and all circumstances to refuse the use of the public streets by picketing, etc., to trade unions engaged in such unlawful campaigns. It must be conceded that the decree does not seek to enjoin and restrain the use of the public highways in carrying out all possible objectives, both lawful and unlawful, as in (*Thornhill* v. *State of Alabama,* 310 U. S. 86). In this respect, the decree merely seeks to restrain the use of the public streets in the carrying out of a particular objective declared unlawful by the policy of the State. The decree does not cover within its ambit all trade union activities; *Thornhill's* case does not apply.

We submit that in *Senn* v. *Tile Layers Union,* 301 U. S. 468, this Court committed itself to the doctrine, viz., that the common law precept, that the picketing and strike campaign can only win immunity from the lawfulness of the ultimate purpose does not defy the Fourteenth Amendment definition of freedom of speech. (See also Frankfurter & Greene, "The Labor Injunction," p. 25.) For it will be recalled that in the opinion of *Senn* v. *Tile Layers Union, supra,* this Court in declaring that freedom of speech is guaranteed by the Fourteenth Amendment, and after making such statement, further declared, immediately following this statement with reference to freedom of speech, "the state may in the exercise of its police power regulate the method and means of publicity as well as the use of the public streets." The quotation appearing in the opinion of this Court, from the *Senn* case, is only part of

the statement found in the opinion in the cited case. It will also be recalled that immediately following this statement, this Court continued by stating in effect that if the end sought is not forbidden by the Constitution, the State may authorize workingmen to picket.

This Court and the Illinois courts recognize that the right to conduct business without interference and the right of employees and customers to ingress and egress to an employer's place of business without being compelled to run the gauntlet of the picket line or even to pass one picket is a right which the Fourteenth Amendment also protects. Even though the Civil Liberty rights may be said to be of such basic and paramount importance in this country that they may destroy (wherever necessary) the property right when the two clash, yet we believe that the right to destroy should be conceded at least to be partly within the control of the state. By this we mean that contemporaneous social and economic conditions in the State at a given time should be inquired into, and that the result of the inquiry should control the conclusion whether in a given case the constitutional protection of the Civil Liberties and of the property right impels the declaration that the civil liberty may destroy the property right. This we submit is the underlying philosophy of both Mr. Justice Brandeis and Mr. Justice Holmes as epitomized in their opinions in the case of *Truax* v. *Corrigan,* 257 U. S. 312. Therefore, we respectfully suggest that this Court erred in failing to take into consideration the social, economic and contemporaneous conditions in the State of Illinois, and that this Court erred in striking down the decree without at least making inquiry or alluding to these conditions; for we called attention in our brief (and we believe that this should have been somewhat persuasive) to the fact that although bills were introduced at sessions of the Illinois legislature by trade unions, in the years 1933, 1935,

1937 and 1939, and by which it was sought to make the objective of the trade unions here lawful by legislation, the Illinois legislature refused to pass such legislation. Other contemporaneous, economic and social conditions were discussed in our brief, which should have been and were apparently not considered by this Court. (See Respondents' brief pp. 34 to 56.) Therefore, we say that when a state court says to the trade unions, "Your objective here is unlawful. Experience has taught us in this State that your campaigns of picketing and patrolling in fact injure the employer; his right and his employees' right to conduct their business without such inference is protected by the same Constitution as you are protected in your right to freedom of speech. If you can succeed in changing the public opinion as it now exists and as we know it, by publicity and effort, without causing a direct injury while so doing, we will permit you so to do. However, we will not permit you to injure and damage while you are molding this public opinion," that such declaration of policy and without further adieu cannot be said to be clearly defiant of the freedom of speech guarantees of the Fourteenth Amendment.

We further submit that by this opinion this Court has in effect said to the trade unions and to the people of this country that trade unions have the complete *laissez faire* right in the competitive process to carry their objectives to doctrinaire limits. If the Fourteenth Amendment offers constitutional protection to the organization campaigns against an entire industry, then it naturally follows as a logical and natural sequence and it appears to us to be immediately in the offing, that trade unions will assert and claim that the ultimate objective of the entire trade union movement, to-wit: that all labor must belong to trade unions, and that there can be no labor other than the trade union labor in the United States is equally constitutionally protected by the Fourteenth

Amendment. When is the economic circle of competition too narrow? Is it for this Court to determine in each and every case, or is this a matter which is relegated under our American system of government to wise statesmanship and not to the courts?

The implications of this opinion are far reaching and dangerous. If the self-help campaigns of trade unions in the competitive process of free competition is constitutionally protected, all competitive process and competition are likewise equally protected. All matters which affect the large consumer public—the farmer and others—not members of trade unions, must be conceded to involve public questions as this term is defined by this Court in *Thornhill* v. *Alabama,* 310 U. S. 86. Therefore, picketing will be asserted to be constitutionally protected in all competitive wars and campaigns. Competitors will contend that they have the right to picket their competitors because their competitor undersells them; because he refuses to keep his store closed on certain days during the week or on Sunday. Employers associations may successfully contend that they have the right to picket and boycott those who will not become members of their associations; employers will assert that even under the National Labor Relations Act that the opinion here grants them the right in the exercise of their freedom of speech to boycott, picket, persuade and entreat employees to refuse to join the trade union or to join a company union or a particular union. Trade unions will claim constitutional protection in picketing each other. Housewives and other consumers would have the right to picket chain stores because they believe that the chain stores are an economic evil; manufacturers will picket retailers because they do not sell the manufacturer's product. Thus in the entire gamut of the field of competitive process there will be claims and assertions that by this opinion picketing, patrolling and persuasion are guaranteed to all engaged

in competition by the constitutional coercion of the Fourteenth Amendment.

When we see all around us today that free competition as to industry and as protected in the years past by this Court under the declaration of constitutional precept, has resulted in the necessity of a change in policy so as to break down what appears to be a tendency of free competition to create trusts and monopolies, and that therefore the ravages of industrial *laissez faire* are extremely harmful, we respectfully submit that the present policy should apply equally to labor self-interest. Experience should teach us that prevention is much better than cure.

If this Court has presumed as a matter of law or fact that the use of the highways by picketing by trade unions is the only effective way of free communication, then we say that this Court has erred in engaging in such presumption, and has certainly erred in making such presumption a conclusive one. To treat the object and purpose of the picketing as being merely for the purpose of persuasion and communication to and of the public is defiant of the historic concept of picketing; for it will be recalled that the trade unions originally offered justification of the right to picket because they wished to watch their members so as to prevent internal sabotage. (See Cogley Strikes and Lockout (1893) p. 193). As time went on, the picketing was justified in this country on the theory that self-interest permitted and justified trying to keep persons from entering the employ of the employer and to persuade employees to leave the employ. Later it was justified as a means of bringing home to the public the merits of the immediate conflict. We respectfully submit that underlying the right and justification of the publicity by the picketing there is the presumption of fact that in the contest the trade union occupies an unequal financial position and cannot on an equal basis compete with the

employer in the publicity campaign. This underlying precept therefore is based upon economic conditions of a time and must change as the contemporary economic and social conditions change. It must be conceded that the publicity by picketing does injure and does have the effect in fact of a pressure campaign brought about by the very presence of the pickets, to deter customers from trading with the attacked employers. The pickets by their very presence, as has been testified to by thousands of cases reported in our books, have the effect of putting a fear in the minds of the employees. They do in fact impede free ingress and egress to the employers' premises. (See "Picketing by Business Competitors," 87 Univ. of Penn. Law Rev. p. 280; "Peaceful Picketing and Freedom of Speech," American Bar Journal (issue Sept. 1940). In our brief (pps. 34 to 56) we have called attention to what we believe to be the actual contemporaneous, economic and social conditions existing in Illinois at the time of the entry of the injunctional order. We believe that we have demonstrated in fact that the trade union defendants in this case do and have by far the greater financial ability compared with the particular employer to present their cause through the ordinary media of publicity. One of the petitioners owns and operates a large radio station in the City of Chicago. (See *Leitzman* v. *Radio Broadcasting Station,* 282 Ill. App. 203.) Two of the petitioners publish and circulate newspapers in the City of Chicago. Judicial notice must be taken of the fact that the public press is today open to the trade unions equally with industry and they have the financial ability to publicize in the general newspaper columns as well as by advertising their side of labor disputes. We say that this Court erred in failing to take these factors into consideration; that these matters of fact are important and should form a part of the consideration and ultimate conclusions of this Court; that such has been recognized by

this Court in *Muller* v. *Oregon,* 208 U. S. 412; Mr. Justice Brandeis, *Truax* v. *Corrigan,* 257 U. S. 312; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152.

We respectfully submit that in failing to take due recognition to these factors, this Court has turned the clock back to *Lockner* v. *New York,* 198 U. S. 45; *Coppage* v. *Kansas,* 236 U. S. 1; *Adkins* v. *Childrens Hospital,* 261 U. S. 525, 567, the majority opinions of which Mr. Justice Holmes and Mr. Justice Brandeis so vigorously protested against by their dissenting opinions; and which dissenting opinions appear to us to have become the majority opinions of this Court in the case of *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, and in other similar cases involving economic and social destiny.

We offer apologies and beg to be excused for engaging in a polemical discussion in a petition for rehearing. We have done so because we honestly and sincerely believe that this case is of tremendous importance and affects the well being and welfare of our generation and those yet to come. May we suggest without being considered presumptuous or intentionally violating the rules of this Court, that by reason of the far reaching effect of this opinion and the matters to which we have called attention in this petition for rehearing, that a reargument of the case may be in order.

May we further suggest that in the event this Court should be of the opinion that a rehearing should not be granted, that an order of complete reversal should not be entered, for the petitioners here and in this court seek only a reversal of a part of the final decree of the State Courts. Therefore, the order of this Court should be that the decree be reversed as to those parts thereof indicated by the opinion of this Court, and affirmed as to the remainder of the decree.

For the foregoing reasons, it is respectfully urged that the petition for rehearing be granted, and that the judgment and decree of the Supreme Court of the State of Illinois be, upon further consideration, affirmed.

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

CERTIFICATE OF COUNSEL.

We, Myer N. Rosengard and Samuel A. Rinella, counsel for the above named respondents, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1940.

American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al., Petitioners,
vs.
Ross W. Swing, Irene Boivin, Nan Chapman, et al.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[February 10, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In No. 1, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, decided this day, we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, 310 U. S. 620, it seemed to present a similar problem. More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?

A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. A preliminary injunction was granted. Answers were then filed denying violence as well as falsity of the placards. The union also moved to strike the complaint and the trial court, finding the complaint wanting in equity, granted the motion and dissolved the preliminary injunction. The appellate court, one of Illinois' intermediate courts of review, held that the trial court was in error. 298 Ill. App. 63. This action of the appellate court was affirmed by the state supreme court. 372 Ill. 91. It found that the complaint properly invoked equity for three reasons: (1) there was no dispute between the em-

ployer and his immediate employees; (2) the placards were libelous; (3) there were acts of violence. Inasmuch as the supreme court affirmed the issuance merely of a preliminary injunction, we denied certiorari for want of a final judgment. 309 U. S. 659. Thereupon, although as we have seen issue had been formally joined on the claims of libel and violence, the appellate court, by a procedure unrevealed by the record and without opinion, entered a permanent injunction ranging from peaceful persuasion to acts of violence. The decree recited "that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees". The union sought review of this decree in the supreme court by writ of error. Swing and his employees moved to dismiss the writ because in seeking to obtain it the union had conceded that "all issues of the case have been settled on prior appeal and that the decree entered by the appellate court is in conformity with the mandate issued" to the appellate court. The writ was dismissed.

Such is the case as we extract it from a none too clear record. It thus appears that in passing upon the temporary injunction the supreme court of Illinois sustained it in part because of allegations of violence and libel. But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that "peaceful persuasion" was forbidden in this case because those who were enjoined were not in Swing's employ. Moreover, as we have seen, the supreme court of Illinois dismissed proceedings before it to review that decree on representations that the decree was in accordance with its mandate on the temporary injunction.

Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Schneider* v. *State*, 308 U. S. 147, 161; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152n., it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review. We are therefore not called upon to consider the applicability of *Milk Wagon Drivers Union* v.

Meadowmoor Dairies, Inc., supra, the circumstances of which obviously present quite a different situation from the controlling allegations of violence and libel made in the present bill.

All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing *en masse* or otherwise conducted" so as to occasion "imminent and aggravated danger". *Thornhill* v. *Alabama,* 310 U. S. 88, 105. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. The right of free communication cannot therefore be mutilitated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478.

Reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

Blank Page

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1940.

American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al., Petitioners,
vs.
Ross W. Swing, Irene Boivin, Nan Chapman, et al.

On petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

[February 10, 1941.]

Mr. Justice Roberts.

I am unable to agree to the court's disposition of this case. I think the writ should be dismissed or the judgment affirmed.

The record presents difficult questions concerning Illinois procedure, as to which the parties are in disagreement, and we ought not to attempt to resolve them.

The respondents filed a complaint in the Circuit Court, on which a temporary injunction issued. The petitioners answered. They also made a motion to dismiss the complaint and that motion was granted, with the result that the temporary injunction was dissolved. On appeal, the appellate court reversed the order dismissing the complaint. From that action an appeal was taken to the Supreme Court of the State, which affirmed the decree of the appellate court. On analysis of the complaint, the Supreme Court found that it charged that no dispute existed between the employer and his employees; that the petitioners had been indulging, and were continuing to indulge, in a series of libels against the respondents; were indulging and were continuing to indulge, in threats and acts of violence. The grounds on which the court sustained the complaint as stating a cause of action in equity are summed up in the conclusion of its opinion thus: "A State or nation ceases to be sovereign if it tolerates within it any force other than its own, and that force must be such as is established by law, directed by the courts, observing the principles of due process and equal protection of the law. To whatever extent these rules are

violated we have lawlessness, and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats but will enjoin the whole scheme."

Thereafter the record discloses merely that the cause came on for further hearing in the appellate court. We do not know whether that hearing was upon the bill and answers or upon the complaint and the motion to dismiss, and the parties are in grave dispute on the subject. We do know from the record that the appellate court, after reciting the previous history of the case, including the affirmance of its judgment by the Supreme Court, and a statement that, under the law of Illinois, peaceful picketing is unlawful when conducted by strangers to the employer, coupled with the further statement that the respondents were entitled "in this case" to relief by injunction against the threat of such peaceful picketing, and that the respondents had maintained their complaint and the equities of the case were with them, the appellate court proceeded to decree "in accordance with the mandate of the Supreme Court of Illinois", that the petitioners should be enjoined from picketing or patrolling respondents' shop, exhibiting signs and placards to persuade persons to refrain from entering the place of business and from acts of violence menacing or coercing persons seeking employment from entering respondents' place of business.

From this final decree the petitioners sued out a writ of error in the Supreme Court of Illinois and the respondents moved to dismiss it for the reason that the order and opinion on the previous appeal "finally settles all the rights of the parties". In the brief filed by the petitioners they stated: "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court . . . . . If this court adheres to the position in *People* v. *Militzer*, 301 Ill. 284, page 287, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

The Supreme Court of Illinois, without opinion, sustained the motion and dismissed the writ of error. I am unable to say that

is action was an affirmance of any recital in the decree of the ppellate court respecting the legality of peaceful picketing dis-nnected with a continued course of publishing libels, making reats, and using force. If the final decree was right on the round stated by the Supreme Court in sustaining the temporary junction; and if, under the Illinois practice, the affirmance of ch a correct decree based on a previous opinion of the Supreme ourt does not amount to the adoption of a preamble or recital the decree, then we ought not to reverse the final decree of the upreme Court, which, on the facts stated in the complaint, is cor-ct when tested by the principles enunciated in *Ethyl Gasoline orporation* v. *United States*, 309 U. S. 436, 461, and in *Milk Wagon rivers Union* v. *Meadowmoor Dairies, Inc.*, No. 1, October Term, 940, just decided, because of a recital in the decree of the appellate ourt.

The CHIEF Justice joins in this opinion.

END